No. 19,426

United States Court of Appeals

For the Ninth Circuit

MAX E. TURNER, et al.,
Appellants,

vs.

KINGS RIVER CONSERVATION DISTRICT, et al.,
Appellees.

APPELLANTS' REPLY TO APPELLEES' PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR MODIFICATION OR CLARIFICATION OF THE COURT'S OPINION AND TO AMICUS CURIAE BRIEFS IN SUPPORT THEREOF

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To the Honorable Judges Oliver D. Hamlin, James R. Browning and Ben. C. Duniway of the United States Court of Appeals for the Ninth Circuit:

PREFACE

Appellees' Petition and the supporting Amicus Curiae Briefs, suggest a rehearing on the grounds that the Opinion of the Court in this case, insofar as it holds that section 8 of the Flood Control Act of 1944 (38 Stat. 887) and the Reclamation Act (32 Stat. 388) incorporated therein by reference, apply to the Pine Flat Project, is unnecessary to the decision, is incorrect as a matter of law and is prejudicial to the parties in certain other pending litigation designed to test that very question.

The argument is that since, under the holding of the Court, the federal officials are not prohibited either by section 8 or the reclamation laws from interfering with appellants' water rights, the Court need not have decided whether they do apply, but could have and should have merely assumed the applicability. The suggestion is that the language of the decision be modified, accordingly, to conform to that appearing on pages 9 and 10 of the Petiiton, or if the question of applicability must be decided, that a full rehearing be granted in order that it be fully briefed and argued.

ARGUMENT

The appellants do not oppose a rehearing. The applicability of the reclamation laws to the Pine Flat Project certainly has not been adequately briefed, if at all. We do suggest, however, that the alternative request for "modification or clarification of the Court's Opinion", is not in order. It is not in order because whether the appellee officials are exceeding their statutory authority, and thus whether the complaint states a cause of action, turns upon applicability of the reclamation laws, for nowhere in the Opinion, except there, is the right of eminent domain found.

The rule is that the right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication.

Hooe v. United States, 31 S. Ct. 85, 218 U. S. 322, 335, 336, 54 L. ed. 1055.

The Court has found that the right is conferred by the reclamation laws. In the absence of an additional finding of authority to "take", a determination that the reclamation laws do apply, is not something which may merely be assumed but it is a matter which must be decided. If eminent domain has not been conferred, the appellee officials are exceeding their statutory powers and the judgment of dismissal must be reversed. If the judgment is to be affirmed, the Court must find that the power exists either in the reclamation laws, which it has, or in other laws, which it has not.

It seems clear that if the Court is to by-pass the question of whether the reclamation laws apply to the Pine Flat Project, much of the Opinion must be rewritten. The matter of whether the right of eminent domain is conferred by other statutes must be explored. Then, and only then, will the Court be in a position to ignore the reclamation laws or, as suggested in the Petition, to assume rather than decide their applicability.

This is not the time or place to explore the question of whether the power of eminent domain exists elsewhere. The Petition is completely silent on the subject. We merely state that we have not found it to exist elsewhere. We say this, notwithstanding that the Amicus Curiae Brief presented by the North Water Storage District and others suggests (p. 6) that it is to be found in 33 U.S.C. 701-C-1. That section, however, merely grants authority to acquire "lands necessary for dam and reservoir projects . . .

for flood control". We are not dealing here with flood waters (R. p. 463, ll. 25 and 26; p. 474, ll. 21 and 22; p. 479, ll. 5 and 6 and 24 and 25) but with waters used by appellants without waste, for irrigation, farming and domestic purposes (R. p. 453, l. 26 to p. 454, l. 2; p. 467, ll. 5 to 7). Even making the doubtful assumption that the word "lands" as used in the section includes water, the water here involved, being non-flood water, is not necessary to the operation of the facilities as a flood control project and the section clearly does not confer the power.

CONCLUSION

For the reasons stated, the Court should grant a rehearing but should deny the request for a mere modification.

Dated, Sacramento, California,
April 21, 1966.

Respectfully submitted,
WILMER W. MORSE,
Attorney for Appellants.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILMER W. MORSE